> "Plaintiff's second amended petition does not state facts sufficient to constitute a cause of action under the Federal Employers' Liability Act, as same is made applicable to 'seamen' under the Jones Amendment (June 5, 1920) to the Merchant Marine Act, and, therefore, is not entitled to recover thereunder,"

it becomes necessary to state the facts alleged in the second amended petition.

This petition alleges that in May, 1926, defendant was operating boats and barges on the Ohio and Mississippi Rivers, carrying freight in interstate commerce; that deceased was employed and was serving in the capacity "of captain or master," "to do all things which are required by custom and law of the duly licensed captain or master of the 'Iowa' "; that the presence of deceased on the "Iowa" in the capacity of captain or master was required by Section 222, Title 46, of Mason's U. S. Code Annotated 1926, which, in part, provides:

> "No vessel of the United States subject to the provisions of this chapter, or chapters 14 and 15, or to the Inspection Laws of the United States, shall be navigated unless she shall have in her service and on board such complement of licensed officers and crew, including certified lifeboat men, separately stated," etc.

That deceased, although licensed and authorized as a captain and master, had no license or authority to act as pilot on said "Iowa" while it was being so operated.

That defendant, in compliance with section 222 of title 46, etc., employed a licensed pilot.

That, although deceased was on board and was acting in the course of his employment and scope of his duties as captain or master, he was not acting as pilot.

That while the "Iowa" was towing an interstate shipment from a point in Pennsylvania to a point in Louisiana, the water was low in the Ohio River, and, as a result thereof, certain barges in the tow grounded in the Ohio River near Stevensport, Kentucky; that the "Iowa" was used and navigated to remove the barges from the ground or sandbar, and the said "Iowa" was so carelessly, negligently, recklessly and unskillfully handled, used, controlled, operated and navigated that they (the agents, servants and employes of the defendant) caused said "Iowa" to collide forcibly and violently with the said barges and the bank of the Ohio River; that at the time said deceased was attempting to save his own life and the lives of others and attempting to save the property of defendant he was thrown into the river and drowned.

Upon these facts the Supreme Court of Missouri (Warner v. Goltra, 67 S. W. [2d] 47, 49) concluded:

> "We do not believe that the master can be considered a seaman within the purview of sections 688 and 713 (46 U. S. C. A.), supra; the trial court properly sustained the demurrer to appellant's petition."

SUMMARY OF POINTS AND AUTHORITIES.

Petitioner's second amended petition, filed in the Circuit Court of the City of St. Louis, Missouri, does not state facts sufficient to constitute a cause of action under the Federal Employers' Liability Act, as that act is made applicable to "seamen" under Section 33 (Jones Amendment, June 5, 1920) of the Merchant Marine Act (S. 688, C. 18, Title 46, U. S. C. A., C. 250, S. 33, 41 Stat. 1007).

I.

The term "seaman" as used in Section 33 (Jones Amendment, June 5, 1920) of the Merchant Marine Act (46 U. S. C. 688) does not include the term "master" so as to make the Federal Employers' Liability Act applicable to masters of ships or vessels the same as it applies to seamen and to employes of railroads in an action by the personal representative of a deceased master to recover damages for the wrongful death of the master of a vessel.

A. Congress has defined the terms "master" and "seamen" as intended in this act, and from a consideration of the other acts of Congress relating to the same subject matter it is manifest that Congress clearly and definitely indicated the intention to differentiate between master and seamen.

Section 713, Chap. 18, Title 46, U. S. C. A.;
Sections 561-579, C. 18, Title 46, U. S. C. A.;

Sections 591-605, C. 18, Title 46, U. S. C. A.;
Sections 641-646, C. 18, Title 46, U. S. C. A.;
Sections 651-688, C. 18, Title 46, U. S. C. A.;
Sections 701-713, C. 18, Title 46, U. S. C. A.;
Section 222, Title 46, U. S. C. A.—Section 4463, R. S.;
Section 375, Title 46, U. S. C. A.;
Buffalo & Grand Island Ferry Co. v. Williams, 25 Fed. (2d) 612;
United States v. Lingren, 28 Fed. (2d) 725;
Rules and Regulations, Steamboat Inspection Service, by United States Department of Commerce.

B. Construction of the terms used in Section 33 of the Merchant Marine Act in relation to other laws and decisions of the Court in connection therewith clearly indicates that Congress did not intend to include the master in the term "seamen" for right of recovery in an action for damages as here presented.

The Arina, 12 P. & D. 118, 123;
Connor v. Flora, 6 Can. Exch. 131, 132;
Corbett v. Pearce (1904), 2 K. B. L. T. Rep. (n. s.) 781, 20 T. L. R. 473;
The M. Vandercook, 24 Fed. 472, 475;
The Marie, 49 Fed. 287;
Gonzales v. U. S. Shipping Board, etc., 3 Fed. (2d) 168;
The Atlantic, 53 Fed. 607, 608;
Robinson v. Baltimore & O. R. Co., 237 U. S. 89, 59 L. Ed. 849;
Browne v. S. W. Browne Co., 221 N. Y. 28, 116 N. E. 364;

Skouitchi v. Chic Cloak & Suit Co., 230 N. Y. 296, 130 N. E. 299, 15 A. L. R. 1825;
Whittelsey v. City of Seattle (Wash.), 163 Pac. 193, L. R. A. 1917 D 1084;
Bates v. Sylvester, 205 Mo. 493, 506;
Troll v. Gas Light Co., 182 Mo. A. 600, 604;
Morrow v. Asher, 55 Fed. (2d) 365, 367;
Braeuel v. Ruether, 270 Mo. 603, 193 S. W. 283, 285, L. R. A. 1918 A 444;
American Asphalt Roof Corp. v. Trimble et al. (Mo. Sup. Ct.), 44 S. W. (2d) 1103, 1105;
Wilhelm v. Hersh (St. L. Mo. A.), 50 S. W. (2d) 735;
Lepard v. Michigan C. R. Co., 166 Mich. 373, 130 N. W. 688, 40 L. R. A. (n. s.) 1105;
Chase v. Erhardt (Dist. Ct.), 198 Fed. 305, 310;
Civil Code of California 1903, Sec. 2049.

C. Construction of the terms used in Section 33 of the Merchant Marine Act in relation to the circumstances attending the passage of the act and the object to be secured leads to the conclusion that Congress did not intend to include the master within the term "seamen" in an action of the nature under consideration.

Proceedings before the Committee of Commerce of the United States Senate on the subject of Merchant Marine, Part II, Vol. 143, pages 674, 1628, 1633, 1638, 1639, 1641, 1643, 1644, 1645, 1656, 1679;
Chelentis v. Lukenbach Steamship Co., 247 U. S. 372.

D. Construction of the terms of Section 33 of the Merchant Marine Act under the rule of interpreting same in the common-sense use of the terms, leads to the same aforementioned conclusion.

Century Dictionary, "Seaman";
Black's Law Dictionary, "Seaman";
The Marie, 49 Fed. 287;
Gonzales v. U. S. Shipping Board, etc., 3 Fed. (2d) 168.

E. Although a pilot is temporarily in charge of a vessel, the master of that vessel is not absolved and the vessel is still under command of the master; the master cannot be construed to be a seaman under Section 33 of the Merchant Marine Act by alleging that he was temporarily away from his post of duty.

The Oregon, 158 U. S. 186, 39 L. Ed. 943;
The Betavier, 1 Spinks, Eccl. 378, 383;
The John A. Morgan-Grinnell v. The John A. Morgan, 28 Fed. 895, 896;
White v. McDonough, 29 Fed. Cas. No. 17,552;
Dorrell v. Schwerman, 111 Fed. 209.

II.

Even though the master may be classified under the term "seamen" as used in Section 33 of the Merchant Marine Act, the petitioner has failed, herein, to state a cause of action in that she fails to allege that the deceased,

at the time of the injury or death, was engaged in interstate commerce, as is required under the Federal Employers' Liability Act.

Thornhill, Admx., v. Davis, Director General (S. C.), 113 S. E. 370, 24 A. L. R. 617, 625;
Elliott v. Payne (Mo.), 239 S. W. 851, 23 A. L. R. 706;
Barry v. Hannibal & St. J. Ry. Co., 98 Mo. 62, 70.

ARGUMENT.

Petitioner's second amended petition, filed in the Circuit Court of the City of St. Louis, Missouri, does not state facts sufficient to constitute a cause of action under the Federal Employers' Liability Act, as that act is made applicable to "seamen" under Section 33 (Jones Amendment, June 5, 1920) of the Merchant Marine Act (S. 688, C. 18, Title 46, U. S. C.; C. 250, S. 33, 41 Stat. 1007).

I.

The first question presented may be more correctly stated:

Does the term "seamen," as used in Section 33 (Jones Amendment, June 5, 1920) **of the Merchant Marine Act** (46 U. S. C. 688), **include the term "master," so as to make the Federal Employers' Liability Act applicable to masters of ships or vessels the same as it applies to seamen and to employes of railroad?**

The question presented by petitioner in her brief assumes that the master of the vessel was killed as the result of the negligence of the respondent herein.

It cannot be stated, as petitioner seems to argue, in this manner: Did Congress intend to **exclude** masters of vessels and their personal representatives from the remedial benefits of section 33? On the contrary, it may be more appropriately asked whether the courts will go beyond the purview of the act and judicially enlarge it to

include master, especially in face of the definitions in Section 713, U. S. C., Title 46.

Petitioner, as the personal representative, seeks to recover damages for the wrongful death of her husband, who at the time of his death was the master and in complete charge of the boat or vessel on the Ohio River. The action is brought under Section 33 (Jones Amendment, June 5, 1920) of the Merchant Marine Act (Sec. 688, U. S. C., Title 46). The act is set forth on page 4 of petitioner's brief and will not be repeated here.

As the act makes no distinction between vessels on the high seas and those on inland waterways, the construction of its terms must be the same as if the present question arose by acts on the high seas.

Respondent contends that the language of the act under consideration and the terms used therein are clear and unambiguous except in so far as petitioner undertakes to bring herself within its terms.

Since this question is raised, however, by her petition, the first consideration is that of determining the intention of Congress by the statutory definitions.

A. Congress has defined the terms "master" and "seamen" as intended in this act, and from a consideration of the other acts of Congress relating to the same subject matter it is manifest that Congress clearly and definitely indicated the intention to differentiate between master and seamen.

Congress, in the Act, June, 1926, to consolidate, codify and set forth the general and permanent laws of the United States in force December 7, 1925, designated the same as "The Code of Laws of the United States of America," and therein provided that said code may be cited as the "U. S. C."

In its codification or restatement of the laws, it entitled title 46 as "Shipping," and chapter 18 thereunder as "Merchant Seamen."

Under this chapter 18 of title 46 were placed all the laws pertaining to "Merchant Seamen," and the sections are numbered from section 541 to section 713, inclusive. Sections 688, "Recovery for injury to or death of seamen," and 713, "Definitions, schedule and tables," became a part of this chapter and title.

The context of the chapter and title demonstrates the legislative intent, without resorting to extraneous matters or other rules of statutory construction, to be that there is a distinction made in the use of the terms "Master" and "Seamen."

For the purposes herein it will be unnecessary to specifically direct attention to each of said sections, but a reference to some will be helpful.

For specific examples we call attention to: Sections 561 to 579, under subtitle "Shipment of Crew," prescribing the duties of the master and the rights of seamen separately, as is illustrated by the language used in section 563 to the effect that the shipping agreement shall be regarded as if same had been entered into between the master of a vessel and a seaman; in section 564 it is provided that "The master of every vessel * * * shall, before he proceeds on such voyage, make an agreement, in writing * * * with every seaman whom he carries to sea as one of the crew"; in section 568 penalties are imposed upon the vessel, "If any master, mate or other officer * * * receives * * * to be entered on board of any merchant vessel any seaman who has been engaged"; in section 570 it is provided "Every master of a merchant vessel who engages any seaman," with practically the same language in section 571. In sections 591 to 605, under title "Wages of Seamen," even a greater distinction is made, because the master here is regarded virtually as the vice-principal with the owner in making proper provisions for the payment of wages to seamen; in sections 621 to 628, entitled "Effects of deceased seaman," specific duties of the master are set forth in these sections as relate to the seamen employed by the master as may be illustrated in the following quotation from section 625: "When-

ever any seaman or apprentice dies in the United States and is, at the time of his death, entitled to claim from the master or owner of any vessel in which he has served." The same distinction is made under sections 641 to 646, under the title "Discharge," wherein the conditions are set forth under which the master may discharge any seaman in his employ. Sections 651 to 688, inclusive, are under the title "Protection and relief," and therein places certain duties and responsibilities upon the master and owner as to the seaworthiness of the vessel, as well as that of providing for other protection and relief, including section 688, entitled "Recovery for injury to or death of seaman." Under the last-named subtitle we call specific attention to section 658, relative to "Discharge of crew on account of unseaworthiness," wherein it is provided "And the master shall, in a reasonable time, remove or remedy the causes of complaint, then the crew shall remain and discharge their duty," and in section 660, "Every master who refuses to pay such wages and charges shall be liable to each person injured thereby in damages"; in section 664 it is provided that "If any seaman, while on board any vessel, shall state to the master that they desire to make complaint." We call specific attention to section 672, entitled "Requirements, qualifications and regulations as to crews," wherein the specific qualifications of seamen are set forth as distinguished from masters and officers wherein the act provides "Every person shall be rated an able seaman and qualified for

service as such on the seas who is nineteen years of age or upward, or has had at least three years service on deck at sea or on the Great Lakes," and also section 673, which provides that "These provisions shall not limit either the authority of the master or other officer or the obedience of the seamen when, in the judgment of the master or other officer, the whole or any part of the crew are needed for the maneuvering of the vessel or the performance of work necessary for the safety of the vessel." Also section 685, wherein "He (consul) shall require the master to pay to such seamen one month's wages over and above the wages due at the time of discharge." Section 688, under consideration in the instant case, is a part of the latter subdivision. In sections 701 to 713, inclusive, under the subtitle "Offenses and Punishments," we find the same distinctions made between master and seamen, and it is under this classification that we find section 713, entitled "Definitions, Schedule and Tables."

Congress, under Section 713 of Chapter 18, Title 46, entitled "Merchant Seamen," defines the term "master" and then, by the conjunction "and," defines the term "seamen."

The terms "master," "seaman", "vessel" and "owner," as used in said section 713, are clearly defined. This section is indexed as "Seaman"—"Definitions of Statutory Terms," and reads as follows:

> "713. **Definitions, schedule and tables.** In the construction of this chapter, **every person having the**

> **command of any vessel** belonging to any citizen of the United States **shall be deemed to be the 'master'** thereof; and **every person** (apprentices excepted) **who shall be employed or engaged** to serve in any capacity on board the same **shall be deemed and taken to be a 'seaman'**; and the term **'vessel'** shall be understood to comprehend **every description of vessel** navigating on any sea or channel, lake or river, to which the provisions of this chapter may be applicable, and the term **'owner'** shall be taken and understood to comprehend **all the several persons**, if more than one, **to whom the vessel shall belong.''**

This section, in defining these terms, clearly distinguishes a ''master'' from a ''seaman'' as much as it does a ''vessel'' from the ''owner,'' or the ''master'' from the ''owner,'' or the ''owner'' from a ''seaman,'' and defines each one.

Congress by its statutory definitions defines, separately, the ''master'' as a person having the command of the vessel, the ''seaman'' as a person (''apprentices excepted'') who is employed or engaged to serve in any capacity on board the vessel, and the ''owner'' as the person to whom the vessel belongs.

The petitioner undertakes to interpret what Congress clearly defines and clings to the idea of exclusion rather than inclusion. In so doing petitioner magnifies the second clause in section 713 and thereby detracts from the context of the whole. Congress clearly defines four terms, namely, ''master'' **and** ''seaman'' **and** ''vessel'' **and**

"owner." Naturally, where one is defined in one clause to the exclusion of the other, there is no necessity of again excluding the other. In the first clause Congress defines "master" to the exclusion of the other members of the crew, as one separate and distinct from the others. The "master" is definitely defined as "having **command** of any vessel" and that such person shall be deemed to be the "master." In other words, Congress defined the master as a vice-principal in complete charge and command of the vessel and the balance of the officers and crew on board. The master was thereby clearly distinguished and separated, by definition and this classification, from the crew and from the term "seaman." That being true, there was no necessity of further excepting the master or again classifying the master in the second classification. It is true, in the second classification Congress excepted "apprentices," but apprentices are not defined in any other part of this section. Had apprentices been separately defined, like "master," "owner" and "vessel," then Congress would not have made this exception as to apprentices.

Under these statutory definitions it is clear that the term "seaman" as used in section 688 does not include the "master."

The above section 713 also contains as a part of said section the "Schedule," which is the form of articles of agreement, wherein there is a further distinction made between the master and the seamen—for instance, "It is agreed between the master and seamen or mariners of the

....., of which ..... is at present master," * * * "and the said crew agree to conduct themselves in an orderly, faithful, honest and sober manner, and to be at all times diligent in their respective duties and to be obedient to the commands of said master."

The foregoing section 713 has been recognized by the federal courts as a statute of statutory definitions under chapter 18, "Merchant Seamen," and under title 46 as applicable to the definition for the term "seaman."

> Buffalo & Grand Island Ferry Co. v. Williams (2nd C. C. A.), 25 Fed. (2d) 612, 613;
> United States v. Lingren (4th C. C. A.), 28 Fed. (2d) 725.

The petitioner in her petition as the basis of her cause of action makes the identical distinction between "master" and "seaman" by alleging therein:

> "Plaintiff further states that the presence of said John M. Warner on board the said 'Iowa' on said May 11, 1926, in the capacity of captain or master, was required by Section 222, Title 46 of Mason's U. S. Code Annotated 1926, which, in part, provides as follows:
>
> " 'No vessel of the United States subject to the provision of this chapter or chapters 14 and 15 or to the Inspection Laws of the United States shall be navigated unless she shall have in her service and on board such complement of licensed officers and crew, including certified lifeboat men, separately stated as may in the judgment of the local inspectors, who inspect the vessel, be necessary for her safe navigation.'

> "And by the rules and regulations of the Steamboat Inspection Service of the Department of Commerce, which rules and regulations are by Section 375 of Title 46 of Mason's U. S. Code Annotated 1926, given the force and effect of laws."

The very section pleaded by this petitioner, Section 222, Title 46, Mason's U. S. Code, or Section 4463, R. S., only partially quoted in the petition, also provides:

> "If any such vessel is deprived of the services of any number of the crew, including certified lifeboat men, separately stated, without the consent, **fault or collusion of the master, owner or any person interested in the vessel, the vessel may proceed on her voyage if, in the judgment of the master,** she is sufficiently manned for such voyage; provided, **that the master shall ship** if obtainable, a number equal to the number of those whose services he has been deprived of by desertion or casualty."

Under "Steamboat Inspection Service of the Department of Commerce Rules and Regulations" which are by Section 375 of Title 46 of Mason's U. S. Code Annotated 1926, given the force and effect of laws, pleaded by the petitioner as part of her cause of action, also makes a clear distinction between "master" and "seamen." For instance, under Section 28 of Rule V, entitled, "Masters of River Steamers," the board of supervising inspectors set forth the form of examination required of a master, and provides "no license as master shall be issued to any

applicant who cannot read and write, and who has not served at least one year as a licensed mate or pilot of steam vessels, and then sets forth that the line of examination to be pursued by the inspectors in examining applicants for original license as master of river steamers shall cover ten specific subjects among which are: "4. As to his knowledge of proper management of vessel and crew in case of collision." "5. As to executive ability generally to manage officers and crew."

The inevitable conclusion from the context of the Acts of Congress relating to the general subject, "Merchant Seamen," as well as the context of the Act of Congress and the Steamboat Inspection Service of the Department of Commerce, rules and regulations pleaded and relied upon by the petitioner in the statement of her cause of action and the statutory definitions contained in Section 713, is that it was not the intention of Congress to include the term "master" in the term "seamen" as used in Section 688.

In view of the foregoing it is contended that the Supreme Court of Missouri, in the instant case, Warner v. Goltra, 69 S. W. (2d) 47, 49, correctly concluded as follows:

"We do not believe that the master can be considered a seaman within the purview of Sections 688 and 713 (46 U. S. C. A.), supra; the trial court properly sustained the demurrer to appellant's petition."

B. **Construction of the terms used in Section 33 of the Merchant Marine Act in relation to other laws and decisions of Court in connection therewith.**

It is conceded that prior to the enactment of the Merchant Marine Act and Section 33 thereof, a seaman was without a remedy against the vessel or its owners for injuries to his person, suffered in line of service under the general maritime law, or at common law, and the personal representatives were without remedy for the death of a person killed as a result of negligence while employed and engaged as a seaman upon a vessel, with the exception of cases resulting from the unseaworthiness of the vessel, or for breach of duty to provide the seaman with maintenance and cure.

In connection with the foregoing statutory definitions of "seaman" and "master," it is well to determine the legal construction placed upon these terms prior and subsequent to the enactment of this law.

An examination of the authorities dealing with the term "seamen" in relatively the same conditions as this term is used in Section 33 of the Merchant Marine Act will disclose that the term "master" is not included in the term "seamen" and that the master is not regarded as a seaman for such purposes.

Starting with the English cases, we find laws similar to the statute under consideration, wherein the terms are defined as above indicated.

In The Arina, 12 P. & D. 118, 123, the Court said:

> "By the interpretation clause of the **Merchant Shipping Act**, 1854 (82), the term 'seaman' is defined as follows: 'Seaman shall include every person (except masters, pilots and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship.'"

And in Connor v. "Flora," 6 Can. Exch. 131, 132, the Court, in construing the **Merchant Shipping Act** and **the Inland Water Seamen's Act**, said:

> "The interpretation clause defines 'seamen' as every person employed or engaged in any capacity on board any ship, except masters or pilots."

The same definition is given by the Court in Corbett v. Pearce (1904), 2 K. B. L. T. Rep. (n. s.) 781, 20 T. L. R. 473, in construing the **Employer's Liability Act** and the Employers and Workmen Act.

Similarly we find that all persons employed in the navigation of a ship or upon a voyage **other than master or mate,** are to be deemed seamen within the provisions of the Civil Code of California 1903, Sec. 2049.

Some of the earlier and later decisions of our Federal Courts aid somewhat in the determination of the construction to be placed upon these terms.

In the M. Vandercook, 24 Fed. 472, 475, the Court said:

> "I am of the opinion that, under the circumstances of the case, the libelant must be treated as a master, and that his claim for wages is not an admiralty lien."

In the case of The Marie, 49 Fed. 287, in determining the right of wages due from a vessel owned by a foreign country, the Court said:

> "By the treaty the consuls of either nation have a right to sit as judges and arbitrators in such differences as may arise between the captains and crews of vessels belonging to the nation whose interests are committed to their charge, without the interference of the local authorities.
>
> "The words 'crews of the vessels,' as here used, include all of the ship's company—**all the seamen** and officers, **except the captain.**"

The Court, in Gonzales v. U. S. Shipping Board etc., 3 Fed. (2d) 168, construing and defining the terms "seamen" and "vessel," said:

> "The same section of the statutes above referred to, Section 8392 of the Compiled Statutes, that defines a 'seaman' defines the term 'vessel.' As we have seen, a 'seaman' is one employed on a 'vessel.' And this section says: 'A "vessel" shall be understood to comprehend every description of vessel navigating on any sea or channel, lake or river.' The Standard Dictionary defines a 'seaman' as: **'One not an officer who takes part in the practical navigation of a vessel—a sailor.'** It defines a 'sailor' as 'one whose occupation is to aid in navigating a vessel, especially one of the crew.'"

In The Atlantic, 53 Fed. 607, 608, the Court said:

> "It is a puzzling question whether libelant stood in the place of the master or not. * * * On the other

> hand, he had none of the responsibility or powers of a master, never had any independent authority, did not get continuous wages, but was paid only when his engine was at work. Upon the whole, I am of the opinion that he cannot be treated as a master of a vessel. He was master in no maritime sense."

There are instances where, due to the context of the law and the purpose to be accomplished, the Courts have construed the term "seaman" to include "master." Some of such cases may be generally referred to as the right to become a citizen of the United States, the right to make nuncupative or unwritten wills, and in certain criminal cases, but in none of these cases is the question of negligence charged to an inferior officer or sailor who is under the direct orders and command of the master, nor do any of these cases involve the control of the vessel which is under the direct charge of the master. Such cases do not undertake to enlarge the term "seamen" to include "masters" for the purpose of recovering for the wrongful death, especially where there had been no remedy provided for such wrongful death.

It is also recognized that our courts, in construing Section 33 of the Merchant Marine Act, have regarded the term "seamen" as flexible enough to include employes engaged on modern vessels, who were not formerly regarded, technically, as seamen, such as a stevedore, carpenter, clerk, engineer, fireman, musician, pilot, wireless operator, and, in some instances, other officers of the vessel, with the exception of the chief executive officer or master, the same as the courts have construed the Federal

Employers' Liability Act to include employes engaged by modern railroads in the various positions for carrying on interstate commerce. This has been done to carry out the purposes of the act so as to make the act applicable to all employes, whether engaged in interstate commerce by railroads or engaged in the transportation of freight and passengers by vessels on the high seas.

In so construing these acts, the courts have not been unmindful of the rule that statutes in derogation of the common law are to be strictly construed, while the remedial features thereof are to be liberally construed.

While, apparently, our courts have not yet been called upon to construe the Federal Employers' Liability Act, so that the term "employe" would include the chief executive officer, the president of a railroad, whose powers and duties extended to the employment of all employes, the supervision and control of all employes, the purchase, furnishing and maintenance of all equipment, and the operation thereof, it is inconceivable that the Court would construe said act so that the representative might recover under the wrongful death provision of that act for the death of said executive due to said executive's failure to perform his duties.

In construing that act it would follow the language of Mr. Justice Hughes in the case of Robinson v. Balt. and O. R. Co., 237 U. S. 89, 59 L. Ed. 849, as follows:

> "We are of the opinion that Congress used the words 'employe' and 'employed' in the statute in

their natural sense and intended to describe the conventional relation of employer and employe."

If the Court would be reluctant to extend the meaning of the term "employe" as used in the Federal Employers' Liability Act so as to make it include the president or chief executive officer of the railroad, then most assuredly the Court would not extend the meaning of the term "seaman" to include the master of a vessel on the high seas, whose authority as master over the vessel, the equipment, the navigation thereof, and the members of his crew, is absolute, supreme and exclusive, and when it is also taken into consideration that it is the duty of both officers and seamen to obey the master of a vessel, for an action of damages against the owner, which damages resulted from the master's failure to perform his duty or exercise the absolute, supreme and exclusive authority granted him.

While not exactly in point, still there is some analogy between the construction of the Workmen's Compensation Acts and the construction of this act which may assist in determining this question.

In the case of Browne v. S. W. Browne Company, 221 N. Y. 28, 116 N. E. 364, wherein the president and principal executive officer of the corporation which employed workmen in a hazardous occupation, undertook to bring himself within the terms and provisions of the Workmen's Compensation Act, the Court held that the president or principal executive officer of the corporation was not considered as an employe within the meaning of the New York Workmen's Compensation Act.

This was later followed in Skouitchi v. Chic Cloak & Suit Company, 230 N. Y. 296, 130 N. E. 299, 15 A. L. R. 1825. In that case the Court, referring to Browne v. S. W. Browne Company, 221 N. Y. 28, said:

> "We simply held that the higher executive officers of a corporation are not, as such, its employes in the ordinary use of the wording."

Since the instant case is brought under the wrongful death feature of Section 33 of the Merchant Marine Act, the same should be strictly construed as to the persons entitled to its benefits without destroying the real purpose and object of the act as affecting employes or seamen. To this extent the same general rules of construction apply to this phase of the Federal Employers' Liability Act and Section 33 of the Merchant Marine Act, as in the case of the construction of the Wrongful Death Acts of the various states.

The Washington Supreme Court (en banc), in the case of Whittelsey et al. v. City of Seattle, 163 Pac. 193, L. R. A. 1917 D 1084, said:

> "Some courts have held the Wrongful Death Act, which, in some form, is common to all the states (3 Shearm. & Redf. Neg., Appx., p. 2015 et seq.), to be in derogation of the common law, and therefore to be construed strictly. Others have held the act to be remedial, and have construed it liberally. But, having in mind our own decisions, we agree with Judge Cooley, who suggests the correct rule: **'That such**

> **statutes should receive a strict construction in determining the persons or classes of persons who are entitled to their benefit,** and a liberal construction in applying the statute in their favor' (1 Cooley, Torts [3d Ed.] 553),"

and then, in the same case, deciding the question involved, said:

> "This Court, adhering to the doctrine of the Noble case and those following it, held squarely that the right of either husband or wife to sue for the death of the other depended entirely upon legislation, and that a statute giving a right of action that did not theretofore exist would not be extended by construction beyond the class or classes specifically mentioned therein."

The Missouri courts have maintained the same position. In the case of Bates v. Sylvester, 205 Mo. 493, 506, the Court, in reaching its conclusion, cited and approved the following:

> "that statutes in derogation of the common law are to be strictly construed, and one who seeks to maintain an action which was within the prohibition of the common law must be able to point to a statute which in plain and explicit terms authorizes the action to be maintained. A plaintiff who sues on a right of action given by the statute must present a case clearly within the statute which creates the right. * * *"

The St. Louis Court of Appeals, in Troll v. Gas Light Company, 182 Mo. App. 600, l. c. 604, said:

> "The statute is in derogation of the common law, and must be strictly construed; and one seeking to maintain an action thereunder must both allege and prove such facts as will bring him strictly within its provisions."

In the same connection the following citations assist in determining the attitude of our courts with reference to the construction of statutes of a similar character:

In a case construing a Texas statute providing for service upon the chairman of the State Highway Commission to secure jurisdiction over a nonresident motorist charged with negligence while driving on the highways in Texas, the District Court, in Morrow v. Asher, 55 F. (2d) 365, 367, held:

> "But, when a lawmaking body passes a statute which, because of necessity, subjects a person to a liability to which he was not therefore subject, the statute should be strictly construed. This was recognized by the courts of Texas in that line of cases which grew out of legislation that overturned the common-law rule that no right of action existed to recover damages for injuries resulting in the death of the injured * * *. The act creating such liability did not mention the acts of agents of natural persons, and the principal could not be held under the statute."

In Braeuel v. Ruether, 270 Mo. 603, 193 S. W. 283, 285, L. R. A. 1918 A 444, a will contest, the question arose as to the proper party, under the statute, having the right to bring such action. The Court held:

"The right of action to contest a will being purely statutory, it is therefore in derogation of the common law, and hence subject to the rule that its provisions must be strictly construed. * * *

"If, however, another well-established rule of statutory construction be invoked, viz., that remedial statutes are to be liberally construed * * *, and it is conceded that the statute in regard to the contest of wills is within this class, then upon a reference to its express terms we find 'only persons interested in the probate of wills' can be made parties to contest of same, and, bearing in mind the character of this interest, as frequently defined by this Court, the conclusion follows that, although the statute may be remedial in its nature, and hence subject to liberal construction, such construction cannot extend beyond its plain terms."

State ex rel. American Asphalt Roof Corporation v. Trimble et al. (Mo. Supreme Court), 44 S. W. (2d) 1103, 1105, certiorari to the Kansas City Court of Appeals, decided by the Supreme Court of Missouri, en banc. The decision is based upon the construction of a statute relating to an action for damages for the wrongful taking and conversion of personal property. The Court held:

"The primary rule for the interpretation of statutes is that the legislative intention is to be ascertained by means of the words it has used * * *. The courts cannot enlarge and change the scope of statutes. * * * A court has no authority to write into a statute a provision not covered by its language. * * * Although the statute may be reme-

> dial in its nature and hence subject to liberal construction, such construction cannot extend beyond its plain terms."

The case of Wilhelm v. Hersh (St. Louis Court of Appeals), 50 S. W. (2d) 735, was for damages for personal injuries sustained in an automobile collision and involved the construction of a statute. The Court held that:

> "It is elementary that, if a statute is of limited application, or creates a limited liability conditioned upon the existence of certain facts, then such limitations and conditions must be met by him who seeks to rely upon it. In other words, a duty created by statute is also to be measured by the statute, and may not be extended beyond the terms and purview of the act."

In Lepard v. Michigan C. R. Co., 166 Mich. 373, 130 N. W. 668, 40 L. R. A. (n. s.) 1105, the Court held:

> "It is a well-established principle that the violation of a statutory duty is the foundation of such persons only as belong to the class intended by the Legislature to be protected by such statute."

Chase v. Erhardt (Distr. Court), 198 Fed. 305, 310, holds that:

> "Laws are construed strictly to assert a right to avoid a penalty; they are construed liberally to give a remedy or carry into effect an object declared in law."

It is reasonable to conclude, therefore, that, irrespective of the statutory definitions, the courts would construe the term "seamen," as used in Section 33 of the Merchant Marine Act, as not including the term "master."

C. **Construction of the terms used in Section 33 of the Merchant Marine Act in relation to the circumstances attending the passage of the act and the object to be secured thereby.**

While the respondent contends that there is no such ambiguity or uncertainty as to the meaning of the terms used in Section 33 of the Merchant Marine Act to justify the Court in resorting to extraneous matters as an aid in arriving at a correct interpretation, still, if the Court will be aided thereby, the respondent joins issue with the petitioner under that rule of construction.

It is common knowledge, of which the Court may take judicial notice, that at the time Congress had under consideration the framing of the Merchant Marine Act and at the time of its enactment there was almost a uniform desire to create an American Merchant Marine for the purpose of transporting American-made products over the high seas to foreign ports and so as to provide American hulls to be used by the United States Navy in times of armed conflicts with foreign countries; that at that time there was considerable controversy that the American laborer or the American wage-earner would not give up his employment in American industries for the wages and

compensation paid to seamen in competition with seamen employed on foreign-owned merchant vessels, and, also, that it was incumbent upon Congress to enact proper and adequate merchant marine laws for the proper protection of ordinary seamen so as to induce Americans to seek employment on American vessels as seamen. The object and the purpose of Congress was to meet this urgent demand, and it enacted the Merchant Marine Act and also the Jones Amendment thereto, Section 33 of the Merchant Marine Act, so as to comply with this demand in order to liberalize the old maritime laws in so far as seamen were concerned and give to American seamen certain rights and greater protection than heretofore afforded them.

As a result of the foregoing the Senate of the United States in 1919-1920 conducted extensive public hearings before its Committee on Commerce for the purpose of investigating the general subject of American Merchant Marine. The proceedings before this committee are contained in part II, volume 143, consisting of 2,089 pages, and covers the entire subject matter of Merchant Marine.

The record shows that there appeared before that committee members of the American Manufacturers' Export association, ship builders, exporters, brokers, agents for steamship lines, officers and members of the National Association of Masters, Mates and Pilots, and officers and members of the International Seamen's Union of America and other individuals and organizations.

It is very apparent upon reading all of these proceedings that on all occasions there was a clear distinction drawn between the master and officers of a vessel and the members of the crew or seamen.

By way of illustration, we quote extracts from the hearings as follows:

Captain Abernathy, at page 674, testified before said committee as follows:

> "The Chairman: Will you state right there, as a master, what the ordinary work is of seamen on steamers?
>
> Captain Abernathy: Simply to keep the vessel up, keep the ship clean, keep the cargo gear in order—that is all. On the Atlantic Coast the sailors do not work freight; have nothing to do with freight; simply to keep the ship in order."

At page 675 he testified:

> "All they do is to keep the ship up is to paint, keep the vessel in order and to overhaul the cargo gear; that is all we have; and the boat gear; keep the boats clear so that everything is in good shape, under the direction of the officers.
>
> The Chairman: How many able seamen are there on an 8,800-ton boat ordinarily?
>
> Captain Abernathy: Ten able seamen.
>
> The Chairman: And how many other seamen?
>
> Captain Abernathy: I believe they have four. I'm not thoroughly familiar with these ships under the merchant conditions. The vessel I was in and the ship I command now has six able seamen and two

ordinary seamen, boatswain and carpenter. That constitutes the deck crew outside of the officers."

At page 676:

"The Chairman: The men down in the fire room, engine room, etc., are not seamen?

Captain Abernathy: No, sir.

The Chairman: They are not classed as seamen?

Captain Abernathy: They are seamen under the law, but they are different from the deck crew. We call the deck crew seamen. **Within the meaning of the law everyone going to sea outside of the master is a seaman.**

The Chairman: That is what I want to get, under the meaning of the law how many are there on your cargo ship?"

We now come to the testimony of Andrew Furuseth, president of the International Seamen's Union of America (as distinguished from the Association of Masters, Mates and Pilots). By reading this testimony it will be seen that all of his testimony refers to seamen as distinguished from masters:

At page 1628 he testified:

"To learn to be a seaman takes three years at least, and that makes a poor man. To learn to be an officer takes a much longer time than that. To learn navigation takes the average schoolboy with the average school education, six weeks."

At page 1633 Senator Edge stated:

> "* * * because, as I understand it (the British system), in a general way they have not any regulation that is anywheres near as helpful to the seamen as the La Follette Act is supposed to be. In other words, they do not require a certain number of able seamen, and many other things."

Similar extracts of this witness' testimony will be found on pages 1638, 1639, 1641, 1643, 1644 and 1645, but we will not lengthen this brief by quoting all of these extracts.

The witness, Mr. Furuseth, then, at page 1649, introduced a lengthy statement of what the duties are of an able seaman, from which the following are extracts:

> "The ratings of sailors, men in the deck department, are: Boy, ordinary seaman, able seaman (quartermaster or boatswain, etc., are able seamen assigned to special work). The able seaman is the unit of skill and efficiency in the deck department. The boy and ordinary seaman is learning to be an able seaman and from among the able seamen, who have studied navigation, comes the officers and future masters of vessels.
>
> "* * * And please keep well in mind that if you do not know the able seaman's work, the master may, under the law, and under ancient usage, reduce you to a rating and pay you according to your demerit.
>
> "Every steamer's crew is divided into three separate sections, known as the deck department, the engine department and the steward's department.
>
> "The deck department (sometimes called the captain's department) has to do with the general naviga-

tion of the ship. Its officers are in general command, the highest deck officer, i. e., the master, being in supreme command of the entire ship, every department being subject to his orders; the first mate taking command in the absence of the master, and the second mate in the absence of his two superiors. The crew of the deck department, in which the able seaman is the unit, consists of the officers, quartermasters—where special men for steering are designated—boatswains, carpenters, a varying number of sailors, officially designated either as the 'able seamen' or the 'sailors,' and boys or men who are or who are supposed to be learning seamanship. A deck crew inefficient in skill or insufficient in number endangers the vessel, her passengers and cargo."

We now quote from the same witness' testimony on page 1656, after the introduction of the foregoing document:

"That covers the ordinary duties of an ordinary seaman's life. It does not cover the extraordinary things. There is not a thing there that a captain of a vessel, or an officer of a vessel, standing on his own feet, without the collar around his neck, will tell you is not a seaman's work, and the work that takes place almost any trip that a vessel goes on. And if he is not as good as that he would rather not have him on board of his vessel, and that is what he will tell you in secret, on the quiet.

"And now they say that we cannot get any men to go to sea, and we seamen, we said: 'You can, and no trouble about it at all.' All you have got to do is to change the conditions and give him a chance and he will come. Now, prior to the passage of the La Fol-

lette Seamen's Act, it was the unanimous consensus of opinion that on the Pacific Coast there were less than 4 per cent of native Americans sailing before the mast; I mean, in the deck department. There was less than 10 per cent on the Atlantic Coast. Now, on the 15th of July, 1917, we had 28.8 per cent of native Americans in the deck department of the Merchant Marine of the United States."

Then, at page 1697, he testified:

"Now, I want to speak about the duties of an officer. As he was learning to use, repair and replace the vessel's gear, he is now learning what a vessel can be made to do under sail, steam or other mechanical power under different conditions as to weather and sea. The master is there to teach him, and he is given opportunity to develop his own judgment by the experience through which he is now passing.

"From among the fourth mates the third mates are selected after either a customary or a statutory period served in the lower capacity. The wise, if not always the customary method, is to select for advancement—from a lower to a higher rating or grade—those who give evidence of the greatest capacity. As experience increases the certificates are raised until the grade of first mate or chief officer is reached. From these (after proper examination for a master's certificate) the employer—the shipowner—selects the man to whom he will entrust his vessel. He is now expected to know all that a vessel can be expected to do under the skillful use of such motive power as the vessel has. But, aside from these accomplishments, he must know the master's duty in port and at sea, under the laws

of his own country and the laws of nations. He must know something of medicine, to give at least first aid to the injured or sick. He must, in order to be a successful master, know how to pick out efficient officers and men, how to make the best use of men and materials in keeping the vessel in order and away from the repair yards and repair ships. Upon this will depend the quickness of the turnaround and the ability of the vessel to pay dividends."

In his testimony he referred to a number of other decisions of the Federal and U. S. Supreme Court, besides the Chelentis case.

The part of his testimony then follows, to which appellant, in her brief, refers, as follows (p. 1712):

"The Chairman: What is the amendment you suggest to section 20?

Mr. Furuseth: That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injuries to railroad employes shall apply. And in the case of the death of any seaman as the result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employes shall be applicable, that is, the amendment.

Senator Fletcher: In other words, under the common law, **if a sailor** should step through an open hatch that had been left carelessly open, he would have no remedy?

Mr. Furuseth: He would have no remedy.

Senator Fletcher: And now you want to change that so he could have a remedy, provided his own negligence did not bring about the injury?

Mr. Furuseth: That is it exactly."

Thus we see that this amendment was presented by Mr. Furuseth, president of the International Seamen's Union, for the benefit and protection of the seamen as he described them in his testimony and documentary evidence, and not for the masters of vessels, and it cannot be presumed that Congress had any other intention.

Since petitioner in her brief singles out the case of Chelentis v. Luckenbach Steamship Company, 247 U. S. 372, in connection with Mr. Furuseth's testimony before said Committee, and argues that the Chelentis case was the basis of Section 33 of the Merchant Marine Act, we should briefly review that case.

The Chelentis case was not an action by the captain or master nor did it involve the right of a master to recover for damages due to personal injuries. The action was by a fireman instituted as a common-law action for personal injury damages based upon an alleged improvident order of his superior officer, as distinguished from an admiralty action for cure, maintenance and loss of wages. The Court denied the relief because "under the

circumstances here presented, without regard to the Court where he might ask relief, petitioner's rights were those recognized by the law of the sea."

Granting that the Senate Committee's attention was directed to this case specifically, and assuming that the Committee had this case in mind in the preparation of the so-called Jones Amendment, Section 33 of the Merchant Marine Act, the reference thereto could only be for the purpose of giving common-law relief to the employes of a vessel such as engineers, firemen and to seamen, and had no bearing whatsoever on the question of distinguishing between the master and the employes or seamen engaged or employed on the vessel.

Even though the Court considers these extrinsic matters, the Court cannot refrain from construing the terms of this Act in accordance with the statutory definitions above referred to, and hold that it was not the intention of Congress to include the term "master" within the term "seamen", and that the real purpose of section 33 was to give remedial benefits to the employes of the vessel who are termed "seamen" and that it was not the intention of Congress to extend this relief to the master, who maintains the arbitrary authority as a vice-principal, over the members of the crew and the vessel itself.

D. **Construction of Section 33 of the Merchant Marine Act under the rule of interpreting same in the common-sense use of the terms.**

In the common use of the terms "master" and "seamen" as used in everyday life by the average individual and by the Press of the country, there is always a marked distinction between the term "master" and the term "seamen," or even the term "members of the crew." The common acceptation of these terms clearly indicates that distinction. The various standard dictionaries define the term "seaman" as follows:

Century Dictionary:

> "A man whose occupation it is to co-operate in the navigation of a ship at sea; a mariner; a sailor; applied to both officers and common sailors, but technically restricted to men below the rank of officers."

Black's Law Dictionary:

> "Sailors; mariners; persons whose business is navigating ships, commonly exclusive of the officers of the ship."

In Marie, 49 Fed. 287, the Court said:

> "The words 'crews of the vessels' as here used, include all of the ship's company—all the seamen and officers, except the captain."

In Gonzales v. U. S. Shipping Board etc., 3 Fed. (2d) 168, the Court, construing and defining the terms "seamen" and "vessel," said:

> "As we have seen, a 'seaman' is one employed on a 'vessel.' * * * The Standard Dictionary defines a 'seaman' as: 'One not an officer who takes part in the practical navigation of a vessel—a sailor.' "

In a technical sense, as used in navigation, and especially under all of the rules and regulations promulgated by the Department of Commerce, there is always a clear distinction made in the use of the term "master" as distinguished from the use of the term "seaman."

The conclusion, therefore, is that, even though we undertake to interpret this act from the common or technical use of the terms, we find that Congress did not intend to include a master of a vessel in its term "seamen" as used in Section 33 of the Merchant Marine Act.

E. **Although a pilot is temporarily in charge of a vessel, the master is not absolved, and the vessel is still under the command of the master.**

In the case of The Oregon, 158 U. S. 186, 39 L. Ed. 943, a collision case occurring in the Columbia River at night, while the captain or master was temporarily absent from his post of duty, and where "the deck watch was composed of the **river pilot in command**, who was on the bridge just above the pilot-house, a man at the wheel and a lookout upon the forecastle head. **No officer** and no other man connected with the vessel **was on deck** from the time the watch was changed at 12 o'clock until the collision."

The Court held:

> "Nor are we satisfied with the conduct of the master in leaving the pilot in sole charge of the vessel. While the pilot doubtless supersedes the master for the time being in the command and navigation of the ship, and his orders must be obeyed in all matters connected with her navigation, **the master is not wholly absolved from his duties while the pilot is on board, and may advise with him**, and even displace him in case he is intoxicated or manifestly incompetent. **He is still in command of the vessel, except so far as her navigation is concerned, and bound to see that there is a sufficient watch on deck, and that the men are attentive to their duties.**"

In Betavier, 1 Spinks, Eccl. 378, 383, it was said by Dr. Lushington:

> "That, **while the master sees that his officers and crew duly attend to the pilot's orders, he, himself, is bound to keep a vigilant eye on the navigation of the vessel, and, when exceptional circumstances exist,** not only to urge upon the pilot to use every precaution, but to insist upon such being taken (Marsden, Collisions, 255)."

In the case of The John A. Morgan-Grinnell v. The John A. Morgan, 28 Fed. 895, 896, the Court said and held:

> "Daniel Grinnell was to be and was the pilot. Philip S. Grinnell now styles himself the master of the seine, who had the oversight of the fishing department. This vessel was what is called a 'single-gang boat' in which

the captain is, as a rule, the master of the seine. 'Double-gang boats' have two masters of seines, one of whom is captain.

"There is not sufficient evidence to enable me to find definitely the reason why the libelant chose to call Daniel Grinnell the captain, **but I believe it was because**, as the result of George W. Miles & Company's failure, **said P. S. Grinnell thought that a captain has no maritime lien upon the vessel** for his wages. **The libelant was actually the captain of The John A. Morgan, and continued so to be till the end of the voyage.**

"The claim of the libelant for a lien for seamen's wages is founded upon a pretense. He was not an ordinary seaman, but was the captain, and should not be permitted to gain a maritime lien through a subterfuge."

In White v. McDonough, 29 Fed. Cas. No. 17,552, a libel was filed by a musician against the master for assault. The vessel was being navigated in the Colorado River.

In that case it was argued that "the master, being merely the agent of the owners, his omission to perform a duty which the owners may have owed to a passenger, under their contract as common carriers, does not give the passenger any right of action against the master."

But the Court held:

"Both the owner and the master are regarded as common carriers. For his own negligence and misfeasances, the master is liable, and there appears to be no distinction in principle between this case and

> many which are found in the books against the masters, **such as for injuries to property arising from negligence or unskillfulness, permitting one of his subordinate officers to maltreat a seaman, for indecent behavior to a female passenger and the like.''**

Again, in the case of Dorrell v. Schwerman, 111 Fed. 209, the Court said:

> "As the libelant was in the relation of mariner, he was during such service subject to the authority vested in the master of the steamer. The rule as to this authority is thus stated by Kent (**3 Kent Com. 131**), and frequently approved by the courts: 'Being responsible over others for his conduct as master, the law, as well on that account as from the necessity of the case, had intrusted him with great authority over the mariners on board. **Such authority is required for the safe navigation of the ship and the preservation of good order and discipline.''**

It will be noted from all the decisions that the courts make a clear distinction in the use of the terms "master" and "seamen" or "mariners" and that the master is not treated as a seaman, but the master is treated as the commanding spirit (the same as the owner) of a vessel, even to the extent that the master becomes liable for injury or damage due to the carelessness or negligence of the crew and that he is vested with supreme authority over the vessel and her crew, from which authority and duty he is not absolved by being absent from his post of duty while a pilot is in charge.

Considering now the only allegation of negligence in the petition, in connection with the foregoing construction, there can be but one conclusion. The sole charge of negligence is that while towing down the Ohio River in low water some of the barges grounded; that the steamer was "used and **navigated**" to unground the barges and while so "used and navigated" the steamer lodged between the shore and the barges with such force as to throw the deceased into the river. If this is anything it is an allegation of careless and negligent **navigation**, a matter which, as a matter of law, is purely and strictly under the power, duty and control of the captain or master and for which he alone is liable and responsible. The only other cause that could be assigned would be that of the ordinary dangers of navigation for which, it would be conceded, there could be no liability against this defendant. Most assuredly it will not be successfully contended that Congress intended to make the term "seaman" so inclusive as to cover the "master" in such circumstances as here disclosed, especially where the duties and obligations of the navigation were solely and purely those of the master and no one else.

Nor can the petitioner herein escape the question, by attempting to bring herself within the purview of Section 33, by claiming that her deceased husband, at the particular moment, although the master of the vessel, was not actually at his post of duty, as the master, and, therefore, should be classified as a seaman under the terms of this act.

II.

There is another ground upon which this demurrer should be sustained, namely, that petitioner must, but does not, allege that the deceased, **at the time of the injury or accident,** was engaged in interstate commerce.

Obviously petitioner is overcautious to create the impression that the deceased was not the master at the particular time of the accident so as to try to leave the inference, at least, that momentarily he transferred his own status from that of master to that of seaman, and in so doing fails to allege that other necessary element above stated, without which allegation she cannot recover, especially since the Federal Employers' Liability Act, made applicable to seamen by reference in Section 33 of the Merchant Marine Act, is the basis of her right of recovery.

In her petition she alleges:

> "That while said 'Iowa' was being navigated, used and controlled by the agents, servants and employes of the said defendant, **other than said John M. Warner,** to unground the said barges so that the said voyage might continue, the said agents, servants and employes of the defendant, **other than the said John M. Warner, and independently of him and while said John M. Warner** was not cognizant of exactly what was being done on all parts of the said 'Iowa,' so negligently, carelessly, recklessly and unskillfully handled, used, controlled, operated and navigated the said 'Iowa' that they caused the said 'Iowa' to collide forcibly and violently with the said barges and the bank of the Ohio

River; that at this time the said John M. Warner was attempting to save his own life and the lives of those on board the said 'Iowa' and was attempting to save the property of the defendant from further injury; that as a direct and proximate result of said collision and the violent jar resulting therefrom and caused thereby, caused as aforesaid by the negligence of the defendant, his agents, servants and employes **other than the said John M. Warner**, the said John M. Warner was thrown from the said 'Iowa' into the waters of the said river and was thus caused to drown."

If said Warner was not then the master, what were his duties? What was he doing in the course of his employment at the particular time?

The petition absolutely fails to bring the deceased within the term. There is nothing, affirmative, in the petition to show in what capacity, if any, the deceased was employed, at the time of the accident, nor does it show, in any manner, what duties, if any, the deceased had to perform or was in the act of performing at that time. On the contrary, the petition negatives the idea that the deceased was engaged in any interstate commerce at the time. Purely negative. Nothing to show the character of employment, if any. Nothing to show his duties, if any. Nothing to show that he was a seaman.

The amendment provides "that any seaman who shall suffer personal injuries **in the course of his employment.**" Nothing is here stated or alleged that he was injured or killed while in the course of his employment. Nothing is

stated as to the nature of his employment, nor is anything alleged as to the duties he was then performing. On the contrary, by negative allegations and by natural inference, the deceased, at the time, was doing nothing and was not engaged in the performance of any duties, much less performing duties as a seaman in the course of his employment.

In Thornhill, Admx., v. Davis, Director General (S. C.), 113 S. E. 370, 24 A. L. R. 617, 625, the Court held:

> "**The contention that both the carrier and the employe must be engaged at the time of the injury in interstate commerce** is supported by the decisions construing the following language of the act: 'Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce.' "

The Supreme Court of Missouri in a case very similar to the one under consideration, in Elliott v. Payne, 239 S. W. 851, 23 A. L. R. 706, held:

> "There is not a word of direct testimony as to why or for what purpose the deceased left his moving engine. The cases (both federal and state) all hold that the burden is upon the plaintiff to show that the servant was about the business of the master at the time of the injury. **Without** this pleading and proof there can be no recovery."

In that same case the Court approvingly quoted from Barry v. Hannibal & St. J. Ry. Co., 98 Mo. 62, 70, as follows:

> "As a general rule it may be conceded that a servant has no claim upon the master for damages for an injury which the servant receives by voluntarily assuming to do something which the master did not employ him to do."

Thus it will be seen that even though the master may be classified under the term "seamen" as used in Section 33 of the Merchant Marine Act, the petitioner has failed herein to state a cause of action, in that she fails to allege that the deceased, at the time of the injury or death, was engaged in interstate commerce, as is required under the Federal Employers' Liability Act.

Petitioner's Citations.

Petitioner cites International Stevedoring Co. v. Haverty, 272 U. S. 50, 52, 71 L. Ed. 157, 160, for the purpose of showing that the Court considered the term "seamen" flexible enough to include stevedores, and, therefore, we should extend the flexibility so as to extend it to master. Cases of similar import are cited by petitioner for the same purpose. However, an examination discloses the Court's reasoning. In the International Stevedoring case the Court gave its reason for so extending the term by showing that the stevedore in that case was, at the time, performing duties formerly performed by the ship's crew or seamen, and in that connection said:

"It is true that for the most purposes, as the word is commonly used, stevedores are not 'seamen.' But words are flexible. **The work upon which the plaintiff was engaged was a maritime service formerly rendered by the ship's crew** (Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 58 L. Ed. 1208) * * *. We cannot believe that Congress willingly would have allowed the **protection to men engaged upon the same maritime duties** to vary with the accident of their **being employed by a stevedore rather than by the ship.** The policy of the statute is **directed to the safety of the men** and to treating compensation for injuries **to them** as properly part of the cost of the business."

The sole question in Burns Bros., 29 Fed. (2d) 855, was whether a master of a tug, in Admiralty, could maintain an action to recover costs for injuries without prepayment of or bond for costs as provided under Section 837 of the Judicial Code and Judiciary and was not decided upon his right to recover damages for personal injuries.

Then petitioner cites and quotes from In re Scott, 250 Fed. 647, which is based upon a declaration of a foreigner, a master, to become a citizen of the United States under the Naturalization Act providing for seamen, being foreigners, to become citizens. Clearly the construction of such an act would not be like that of the one under consideration. As previously pointed out, there are instances where the term "seaman" is broad enough to cover "masters," viz., in matters of naturalization, protection against

criminal and felonious assault, matters relative to certain military duties, and matters going to the validity of nuncupative or unwritten wills. The Court, in that very case, recognized the distinction by the following language:

> **"It is manifest that the word 'seaman' might be used in different enactments in different senses, and the intended sense might appear from the context."**

In the matter here under consideration we must not be unmindful of the fact that Congress is giving to a class, "seamen," employes, members of the crew, "men," a right or remedy not enjoyed at common law, and, furthermore, Congress specifically defines the terms therein used.

The petitioner then continues upon the same erroneous theory heretofore maintained, namely, that it is here attempted to **exclude** something as distinguished from the real situation as to whether Congress, by first specifically defining "master" and then "seamen," intended to **include** master in its classification of seamen. Petitioner entirely overlooks the real purpose of the act as that to protect the men, the employes, and not the executive officers, the commander, the master or the vice-principal. This is not a case of "exceptions" made in the statute as contended. The authorities cited by petitioner are based upon that theory. For this purpose, without burdening this brief, it will suffice to call attention to one of these cases cited, namely, Piedmont & N. R. Co. v. U. S., 30 Fed. (2d) 421, 431, which was an action to set aside an order of the Inter-

state Commerce Commission denying application for public convenience and necessity, and involved the construction of the Transportation Act of 1920, particularly section 22, in which "The authority of the Commission conferred * * * **shall not** extend to the construction * * * of street, suburban," etc. That was a case of express limitation more than that of an exception and involved a general policy as to our transportation systems. That part of that decision relied upon recognizes this in this language (l. c. 431):

> "On the contrary, it is an elementary rule that **exceptions from the general policy embodied in a** statute are to be strictly construed and are not to be so interpreted as to destroy its remedial purpose."

In considering the cases cited by petitioner to substantiate the position that our courts have construed the term "seamen" to include the "master" we must keep in mind the nature of this cause of action, which is based upon allegations of negligence and the theory of recovery for personal injuries or death resulting through the carelessness and negligence of respondent's servants who are directly under and subject to the orders of the master of the vessel.

The Balsa, 10 Fed. (2d) 408, was not one growing out of common-law negligence, nor did it involve the construction of statutory law, but was one in admiralty, for recovery of the costs of cure and maintenance. The lower court

denied his claim for damages but allowed him for cure and maintenance, which latter claim was appealed and affirmed.

Before giving weight, as petitioner does, to the quotation from Nogueria v. N. Y. N. H. & H. R. Co., 32 Fed. (2d) 179, and 281 U. S. 128, 74 L. Ed. 754, we must determine what facts were before the Second Circuit and the Supreme Court and what was the question to be determined. Neither Court was called upon to determine whether the term "seamen" included "master," and neither so decided. That was an action by a freight handler and the question arose whether his remedy was under the "Jones Amendment" or under the Longshoremen's and Harbor Workers' Compensation Act. Nor is petitioner justified in inferring that the Supreme Court thereby inferred that the "master" had his remedy under the Jones Act. There is no dispute and there is no question but that this petitioner had a remedy for the death of her husband, if the facts justified same, but she has elected the wrong remedy here and cannot maintain this action under this statute. In the aforesaid case cited the Court of Appeals similarly held:

> "In the meantime **seamen** had been given by the Jones Act * * * the remedies accorded to railway **employes** under the Employers' Liability Act. * * * As a result the **seamen** were satisfied with their condition and, through their organized representatives,

made known to Congress that they wished to remain outside the Longshoremen's and Harbor Workers' Compensation Act."

It is true that in the case of In re Eastern Transport, 37 Fed. (2d) 355, the Court recognized the right of the representative of the deceased master of a barge to institute an action in damages for his death, based solely upon the **unseaworthiness** of the barge, but the Court's language distinguished that case from the one under consideration by holding that the deceased was, in fact, not a master (l. c. 363):

> **"The master of the barge was in effect not a captain or master, within the general acceptation of those terms, but was simply an attendant on the barge. A bargee has not the power and authority of a ship-master. * * * His position, if not identical with, is at least very similar to, that of an ordinary seaman."**

In the case of Clyde S. S. Co., 16 Fed. (2d) 930, the controversy grew out of an action by the widow, administratrix of the deceased, Beer, who was not the captain or master of the vessel, but was an officer. The accident grew out of the explosion of gunpowder, and the testimony showed "that **the master** instructed Beer to cover the powder with a tarpaulin and watch it."

It is not necessary in determining this case to say whether the term "seaman," as used in the act, includes

the other officers of a vessel, but suffice to say that the act does not define any other officer and no other officer stands in the same superior and commanding position as the captain or master, especially in matters of directing the navigation or course of the ship.

The case of Crosby Fisheries, Inc., 31 Fed. (2d) 1004, grows out of an accident resulting in the death of the mate of a boat. This is the opinion of the District Court and not the Circuit Court of Appeals.

The case of The Buena Ventura, 243 Fed. 797, was a case in admiralty by a wireless operator seeking to recover for maintenance, cure and wages.

Without reviewing each of the great number of cases cited by petitioner, we may state that those above referred to fairly disclose the trend of all that have been or can be cited. We again repeat that petitioner can get little, if any, comfort or satisfaction out of any of them for the purpose of sustaining her position herein.

IN CONCLUSION,

It may be stated that, irrespective of which rule of statutory construction is adopted to determine the extent of the meanings of the terms "master" and "seamen" as used by Congress in Section 33 of the Merchant Marine Act, the conclusion must be in accordance with the definitions adopted by Congress in section 713, and, therefore, this action of petitioner cannot be maintained under Section

OPINION

SUPREME COURT OF THE UNITED STATES.

No. 4.—October Term, 1934.

Claire A. Warner, Administratrix of the Estate of John M. Warner, Deceased, Petitioner,
vs.
Edward F. Goltra, doing business under the style and name of the Goltra Barge Line, Respondent.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

[November 5, 1934.]

Mr. Justice Cardozo delivered the opinion of the Court.

The master of a tug-boat met his death on the waters of the Ohio River through the negligence of a pilot employed to navigate the tug. The personal representative brought suit against the owner under the Merchant Marine Act of 1920, § 33 (41 Stat. 1007, 46 U. S. C. §688) for the recovery of damages. The trial court sustained a demurrer to the complaint on the ground that a "master" is not a "seaman" within the meaning of the statute. The Supreme Court of Missouri affirmed the judgment for the owner. 334 Mo. —, 67 S. W. (2d) 47. The case is here on certiorari. 292 U. S. 617.

The statute is set forth at large in opinions of this Court. *Panama R. Co.* v. *Johnson*, 264 U. S. 375, 383; *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 371. It gives to "any seaman" injured in the course of his employment, and in case of the death of such seaman to his personal representatives, a cause of action similar to that given by the statutes of the United States to railway employees. In the enforcement of the statute a policy of liberal construction announced at the beginning has been steadily maintained. Early in the history of the act, the question came up whether it gave a remedy to stevedores. We decided that it did. "It is true that for most purposes, as the word is commonly used, stevedores are not 'seamen' ". *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50, 52. None the less, verbal niceties were

bent to the overmastering purpose of the act to give protection to workers injured upon ships. "Words," we said, "are flexible." *International Stevedoring Co.* v. *Haverty, supra,* at p. 52. Later decisions of this Court have been conceived in a like spirit (*Jamison* v. *Encarnacion,* 281 U. S. 635; *Uravic* v. *F. Jarka Co.,* 282 U. S. 234; *Cortes* v. *Baltimore Insular Line, supra,* at p. 375), and other courts have followed suit.[1]

The problem for solution here stands out upon this background. There are contexts in which the word seaman is held to exclude the master or even any officer. See, e. g., R. S. § 4530, as amended by § 31 of the Merchant Marine Act of 1920 (46 U. S. C. § 597); also 46 U. S. C. §§ 564, 568, 570, 592, 594, 597, 658, reenacting R. S. §§ 4511, 4515, 4517, 4525, 4527, 4530, 4561, as from time to time amended. There are other contexts in which it takes them in. 28 U. S. C. § 837; also R. S. § 2174; *In re Scott,* 250 Fed. 647, 648; *The Balsa,* 10 F. (2d) 408; *The Burns Bros.,* No. 31, 29 F. (2d) 855. The respondent points to statutes that develop the antithesis between a seaman and those over him. See citations, *supra.* They do not carry us very far, any more than the contrast that exists for many purposes between a seaman and a stevedore. In a broad sense, a seaman is a mariner of any degree, one who lives his life upon the sea. It is enough that what he does affects "the operation and welfare of the ship when she is upon a voyage." *The Buena Ventura,* 243 Fed. 797, 799, where a wireless operator was brought within the term. In a narrow sense the term is limited to one who is an ordinary seaman and nothing more, a seaman as opposed to the master or an officer. One can find a like range of variation in the use of the word "crew." "It is sometimes used to comprehend all persons composing the ship's company, including the master; sometimes to comprehend the officers and common seamen, excluding the master; and sometimes to comprehend the common seamen only, excluding the master and officers." *United*

[1] See Grimberg *v.* Admiral Oriental S. S. Line, 300 Fed. 619; The Sea Lark, 14 F. (2d) 201; Kuhlman *v.* W. & A. Fletcher Co., 20 F. (2d) 465; Rogosich *v.* Union Dry Dock & Repair Co., 67 F. (2d) 377; and cf. The Buena Ventura, 243 Fed. 797, 799: "The word 'seaman' undoubtedly once meant a person who could 'hand, reef and steer', a mariner in the true sense of the word. But as the necessities of ships increased, so the word 'seaman' enlarged its meaning."

States v. *Winn,* 3 Sumn. 209, 213, 214, Fed. Cas. No. 16,740 (Story, J.); cf. *The Buena Ventura, supra,* 799 (Hough, J.); *The Bound Brook,* 146 Fed. 160, 164; *United States* v. *Huff,* 13 Fed. 630. What concerns us here and now is not the scope of the class of seamen at other times and in other contexts. Our concern is to define the meaning for the purpose of a particular statute which must be read in the light of the mischief to be corrected and the end to be attained. Congress knew that men employed upon a ship were without a remedy in damages for negligence beyond their cure and maintenance, unless the injury was a consequence of the unseaworthiness of the ship or a defect in her equipment. *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372, 384; *Cortes* v. *Baltimore Insular Line, supra.* This restriction upon remedies was applicable to ordinary seamen, but applicable also to officers and even to the master. *The Brig George,* 1 Sumn. 151, Fed. Cas. No. 5,329 (Story, J.); *The Balsa, supra.* "It is said, that the allowance by the maritime law belongs to the seamen only, and cannot be claimed by the master of the ship. . . . No authority is cited for this position; and I am not aware that any exists." Story, J., in *The Brig George, supra,* at p. 155. Cf. the rule in Great Britain under the Merchant Shipping Act, 1906 (6 Edw. 7, No. 48, § 34). The old measure of recovery was the same for all aboard, the highest and the lowest. The new measure was not designed to narrow the protected class while broadening the damages. We stick too closely to the letter if we say that Congress had the will to give damages for wounds or death to the crew at large or their dependents and to leave the master and his dependents out. An ancient evil was to be uprooted, and uprooted altogether. It was not to be left with fibres still clinging to the soil.

The purpose of the lawmakers, clear enough, we believe, upon the surface of the act, takes on an added clearness when the act is viewed in the setting of its history. Section 33 of the Merchant Marine Act of 1920 is derived from § 20 of the Act of 1915. 38 Stat. 1185. The parent section was aimed at the fellow-servant rule in its application to torts upon navigable waters. *Chelentis* v. *Luckenbach S. S. Co., supra.* It provided that "in any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow-

servants with those under their authority." Masters were thus recognized as within the genus seamen, though they were seamen having command. The decision of this Court in the *Chelentis* case gave warning that the change, if any, thus effected, did not avail to increase the damages beyond the cost of cure and maintenance. Thus warned, the lawmakers amended § 20 of the Act of 1915 by substituting § 33 of the Act of 1920. We cannot believe that in this process of amendment the word seamen lost the broad meaning that it had in the law to be amended, and was narrowed by the exclusion of a particular species of seamen, i. e., seamen having command. The change is too sudden to be accepted as intended unless unmistakably declared.

The scheme of legislation becomes symmetrical and consistent when the Merchant Marine Act of 1920 is read in the light of another act in *pari materia,* the Longshoremen's & Harbor Workers' Compensation Act (33 U. S. C. § 901 *et seq.*) adopted in 1927. This act expressly excludes from its "coverage" a "master or member of a crew of any vessel." § 903. The exclusion was at the request of seamen who notified the committee in charge that they preferred the remedy for damages under the act of 1920 to the benefits that would be theirs under a system of workmen's compensation. See Hearings before a Subcommittee of the Senate Committee on the Judiciary, 69th Cong., 1st Sess., on S. 3170, at p. 17; Cong. Rec., 69th Cong., 2d Sess., vol. 68, part 5, p. 5908; *Nogueira* v. *N. Y., N. H. & H. R. Co.,* 281 U. S. 128, 134, 136. The bill was accordingly amended in its progress through the House by declaring the exception. There can be little doubt that Congress did this in the belief that under the statutes then in force master and crew alike were already adequately protected in case of injury or death. The belief had a sound foundation in the act of 1920. Cf. *Nogueira* v. *N. Y., N. H. & H. R. Co., supra,* at p. 134.

In reaching the opposite conclusion, the Supreme Court of Missouri rested its opinion on § 713 of Title 46, c. 18 of the U. S. Code, which for the purpose of construction defines a master and a seaman as well as other terms.[2] With a few verbal changes § 713

[2] "In the construction of this chapter, every person having the command of any vessel belonging to any citizen of the United States shall be deemed

is a reenactment of § 65[3] of the Act of June 7, 1872 (17 Stat. 277), which was then known as § 4612 of the Revised Statutes. In the compilation of the Code some of the provisions for the protection of seamen contained in the act of 1872 were placed in Title 46, which relates to shipping, and particularly in Chapter 18 of that title, which relates to "Merchant Seamen." They had previously been reenacted, as parts of the Revised Statutes, along with § 65. The acts of 1915 and 1920 were placed in the same chapter and title, and were thus brought into contiguity with the sections carried over from the Act of 1872. Very clearly the change of location did not work a change of meaning. The rule of construction laid down in § 713 must be confined to those sections of the chapter which were contained in the Act of 1872, or in the equivalent provisions of the Revised Statutes, before the Code had rearranged them. The compilers of the Code were not empowered by Congress to amend existing law, and doubtless had no thought of doing so. As to that the command of Congress is too clear to be misread. 1-4 U. S. C. § 2a, 44 Stat. Part I, 1.[4] To this it must be added that § 713, even in its relation to the sections fairly within its range, is "directed to extension not to restriction." *Uravic* v. *Jarka Co.*,

to be the 'master' thereof; and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seaman'; and the term 'vessel' shall be understood to comprehend every description of vessel navigating on any sea or channel, lake or river, to which the provisions of this chapter may be applicable, and the term 'owner' shall be taken and understood to comprehend all the several persons, if more than one, to whom the vessel shall belong."

[3] "That to avoid doubt in the construction of this act, every person having the command of any ship belonging to any citizen of the United States shall, within the meaning and for the purposes of this act, be deemed and taken to be the 'master' of such ship; and that every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same, shall be deemed and taken to be a 'seaman' within the meaning and for the purposes of this act. . . ."

[4] "The matter set forth in the Code, . . . shall establish prima facie the laws of the United States, general and permanent in their nature in force on the 7th day of December, 1925; but nothing in this act shall be construed as repealing or amending any such law, or as enacting as new law any matter contained in the Code. In case of any inconsistency arising through omission or otherwise between the provisions of any section of this Code, and the corresponding portion of legislation heretofore enacted, effect shall be given for all purposes whatsoever to such enactment."

supra, at p. 239. It means that "for the purposes of the chapter 'seaman' shall include persons who otherwise might be deemed not to be seamen." It puts into the class some that might otherwise be excluded; it does not take any one out who would otherwise be there.

The case for the respondent reduces itself to this, that by express or implied antithesis the word seaman is used in many statutes to designate a class of mariners exclusive of the master. It is also true, however, that in these same statutes a seaman excludes a stevedore. A goodly number of the statutes where the antithesis is sharpest lay a duty upon the master to be performed for the seamen under him. In laws so framed, there is no room for construction. A goodly number in addition give a remedy to seamen for wages wrongfully withheld, or define terms of payment that agreement may not vary. In respect of dealings of that order, the maritime law by inveterate tradition has made the ordinary seaman a member of a favored class. He is a "ward of the admiralty," often ignorant and helpless, and so in need of protection against himself as well as others. The master, on the other hand, is able in most instances to drive a bargain for himself, and then when the bargain is made, to stand upon his rights. Discrimination may thus be rational in respect of remedies for wages. *The Bethulia*, 200 Fed. 876; *The Putnick*, 291 Fed. 902. It is neither rational nor just if extended to remedies for bodily wounds. At such times master and seaman are approximately equal. Congress did not mean that the master, any more than the seaman, should be left without a remedy if wounded in his body, or that his dependents were to be helpless if the wounds resulted in his death.

The judgment is reversed, and the cause remanded to the Supreme Court of Missouri for further proceedings not inconsistent with this opinion.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.